

United States Court  
Southern District of Texas  
FILED

AUG 06 2004

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

§ Civil Action No. H-01-3624  
§ **(Consolidated)**

§ CLASS ACTION

\_\_\_\_\_  
This Document Relates To:

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

\_\_\_\_\_  
THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

\_\_\_\_\_  
**LEAD PLAINTIFF'S MOTION TO ENFORCE DEPOSITION PROTOCOL ORDER  
AND TO COMPEL JP MORGAN CHASE TO PROVIDE DISCOVERY**

2316

## **I. INTRODUCTION**

In violation of the express language of the Federal Rules of Civil Procedure and the Deposition Protocol Order governing this action, counsel for J.P. Morgan Chase & Co. and its affiliates named in this action (“JP Morgan”) has improperly instructed an important percipient witness to not answer deposition questioning merely on the grounds of relevance. In this regard, the Court has been particularly clear: “Counsel shall not instruct witnesses not to answer questions, except on the ground of privilege.” Deposition Protocol Order dated March 11, 2004 at 12. As the Court has already admonished the parties “that it will not tolerate” violations of the Deposition Protocol Order, Order Granting Motion to Clarify Deposition Protocol Order to Prohibit Objections and Coaching of Witnesses During Deposition dated July 9, 2004, JP Morgan’s conduct should be sternly rebuked. Moreover, plaintiffs request that the Court order JP Morgan to make Jeffrey Dellapina available for further deposition at plaintiffs’ discretion.

## **II. ARGUMENT**

Lead Plaintiff alleges that the banks in this case (in particular, their employees) were motivated to arrange, structure, fund and execute transactions to manipulate Enron’s financial statements because (among other things) they were rewarded with lucrative compensation. While bank employees have been reluctant to admit their compensation was affected by their business with Enron and certain employees (*i.e.*, Marc Shapiro, former officer of J.P. Morgan Chase & Co.) cannot even recall a ballpark estimate of their compensation, it has been apparent that compensation was significantly higher when business was done with Enron, as compared with when there was little or no business with Enron. For example, Jeffrey Dellapina’s compensation was in the millions of dollars when his business with Enron was greatest (*e.g.*, \$2.15MM in 2000, and \$1.5MM in 2001) but plaintiffs were precluded from learning his compensation in years after his business with Enron ceased.

Counsel for JP Morgan improperly instructed JP Morgan employee and percipient witness, Jeffrey Dellapina, to not answer deposition questions concerning the amount of his compensation in 2002 and 2003. *See* Dellapina Tr. at 572-74 (attached hereto as Ex. A). David Woll, counsel for JP Morgan, set forth his basis for doing so on the record:

Q. And can you tell me now what your compensation was for the year 2002 including any bonus you received in connection with that year?

MR. WOLL: Hold on before you answer that, Jeff. Obviously I let him answer the questions with respect to the period of time in dispute. ***I think going to 2002 though is irrelevant*** and given the sensitivity of this information, I'm not sure that Mr. Dellapina should be required to provide his compensation after the Enron bankruptcy.

MS. SAMMONS: I think it is relevant to the extent that the Enron prepays calculated into the transaction at all. If you want to direct him not to answer you can direct him not to answer and we'll take it to the court, but I'm going to ask the question.

MR. WOLL: At this point I will direct the witness not to answer and we can discuss this I think after the deposition and figure out whether ultimately that information is something we'll give you voluntarily or not.

\* \* \*

Q. And for the year 2003, can you tell me what your compensation was for that year including any bonus you received in connection with that year?

MR. WOLL: Same instruction.

Dellapina Tr. at 572-73 (emphasis added). During a break counsel for Lead Plaintiff requested that counsel for J.P. Morgan inform counsel prior to the close of the deposition whether Mr. Dellapina would be allowed to answer questions concerning compensation after 2001. Counsel for J.P. Morgan never provided a response.

Relevance is simply an inappropriate ground for instructing a witness not to answer a question. The Court has clearly cautioned the parties that the only proper basis for instructing a witness not to answer a question is privilege. Deposition Protocol Order dated March 11, 2004 at 12

(“Counsel shall not instruct witnesses not to answer questions, except on the ground of privilege.”).

The Federal Rules of Civil Procedure are in accord:

Under the plain language of Fed. R. Civ. P. 30(d)(1), counsel may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to suspend a deposition in order to present a motion under Fed. R. Civ. P. 30(d)(3). ***It is inappropriate to instruct a witness not to answer a question on the basis of relevance.***

*Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).<sup>1</sup> See also *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977) (same). “Lack of relevance is not a ground for an instruction not to answer under Rule 30(d)(1).” *Jones v. Robinson*, No. 1:00 cv 512, 2001 U.S. Dist. LEXIS 4840, at \*3 (W.D. Mich. April 9, 2001). Accordingly, Mr. Woll’s instruction to Mr. Dellapina was improper.

### III. CONCLUSION

For the reasons stated herein, plaintiffs respectfully request that the Court order J.P. Morgan to make Jeffrey Dellapina available for thirty minutes of further questioning concerning

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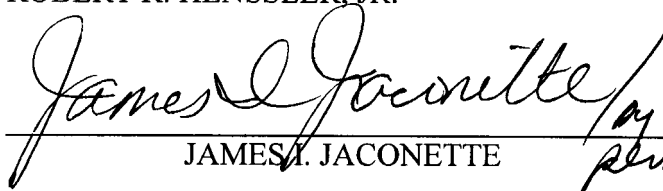
<sup>1</sup> Fed. R. Civ. P. 30(d)(1) now makes reference to Fed. R. Civ. P. 30(d)(4) but remains substantially the same.

compensation at a later date to be chosen by plaintiffs and that the Court, once again, admonish all parties that it will not tolerate violations of the Deposition Protocol Order.

DATED: August 6, 2004

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO ENFORCE DEPOSITION PROTOCOL ORDER AND TO COMPEL JP MORGAN CHASE TO PROVIDE DISCOVERY document has been served by sending a copy via electronic mail to [serve@ESL3624.com](mailto:serve@ESL3624.com) on this August 6, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO ENFORCE DEPOSITION PROTOCOL ORDER AND TO COMPEL JP MORGAN CHASE TO PROVIDE DISCOVERY document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this August 6, 2004.

Carolyn S. Schwartz  
United States Trustee, Region 2  
33 Whitehall Street, 21st Floor  
New York, NY 10004



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Mo Maloney





1 JEFFREY W. DELLAPINA - CONFIDENTIAL  
 2 that year including any bonus you received  
 3 in 1999 for the year 1998?  
 4 A. I'm guessing and I think it  
 5 was around 850,000.  
 6 Q. And of that approximately  
 7 850,000 can you tell me how much was bonus?  
 8 A. Probably around 700,000.  
 9 Q. Can you tell me, please, what  
 10 your total compensation was for the year  
 11 1999 including any bonus that you received  
 12 in the year 2000 for the year 1999?  
 13 A. Just give me a moment, please,  
 14 to think.  
 15 Q. Sure.  
 16 A. When I cross over the years  
 17 it's hard to think about. I think it was  
 18 around 1.85 or 1.9 million  
 19 Q. And of that 1.85 or 1.9  
 20 million in compensation that you received  
 21 during the year 1999, or for the year 1999,  
 22 can you tell me how much was bonus?  
 23 A. Probably about 1.75. Just  
 24 so -- and compensation includes all  
 25 potential future compensation, right?

1 JEFFREY W. DELLAPINA - CONFIDENTIAL  
 2 compensation that year including any bonus  
 3 that you received in January or in 2002?  
 4 A. 1.5 million.  
 5 Q. And --  
 6 A. My only hesitation is that  
 7 it's difficult sometimes when the stock gets  
 8 realized years later to look back and think  
 9 about when -- it's not the cash income --  
 10 Q. I appreciate your effort.  
 11 A. It's the --  
 12 Q. I appreciate your effort to  
 13 quantify it.  
 14 A. That's okay.  
 15 Q. Of the approximately 1.5  
 16 million that you received in 2001, can you  
 17 tell me roughly how much was bonus?  
 18 A. Approximately 1.35.  
 19 Q. And can you tell me now what  
 20 your compensation was for the year 2002  
 21 including any bonus you received in  
 22 connection with that year?  
 23 MR. WOLL: Hold on before you  
 24 answer that, Jeff. Obviously I let him  
 25 answer the questions with respect to the

8/4/2004 8:05 PM

571

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573

1 JEFFREY W. DELLAPINA - CONFIDENTIAL  
 2 Q. Yes  
 3 A. Because we get bonus in the  
 4 form of stock, options, stock that, you  
 5 know, are not available for years, but --  
 6 Q. That is in fact what I intend,  
 7 yes.  
 8 A. Okay.  
 9 Q. And for the year 2000, can you  
 10 tell me what your total compensation was for  
 11 that year including any bonus that you  
 12 received in the year 2001 related to the  
 13 year 2000?  
 14 A. It was 2.15.  
 15 Q. And how much of the 2.15 --  
 16 and when you say 2.15, you mean \$2.15  
 17 million, correct?  
 18 A. That's correct.  
 19 Q. How much of the \$2.15 million  
 20 that you received in the year, or for the  
 21 year 2000 in compensation was bonus?  
 22 A. It would have been two  
 23 million.  
 24 Q. And then in the year 2001, can  
 25 you tell me how much you received in

1 JEFFREY W. DELLAPINA  
 2 period of time in dispute. I think going to  
 3 2002 though is irrelevant and given the  
 4 sensitivity of this information, I'm not  
 5 sure that Mr. Dellapina should be required  
 6 to provide his compensation after the Enron  
 7 bankruptcy.  
 8 MS. SAMMONS: I think it is  
 9 relevant to the extent that the Enron  
 10 prepays calculated into the transaction at  
 11 all. If you want to direct him not to  
 12 answer you can direct him not to answer and  
 13 we'll take it to the court, but I'm going to  
 14 ask the question.  
 15 MR. WOLL: At this point I  
 16 will direct the witness not to answer and we  
 17 can discuss this I think after the  
 18 deposition and figure out whether ultimately  
 19 that information is something we'll give you  
 20 voluntarily or not.  
 21 MS. SAMMONS: Well ultimately  
 22 I may want that information on tape if I  
 23 want that information.  
 24 MR. WOLL: I'm not sure what  
 25 the -- okay. Fair enough. For right now

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572

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574

JEFFREY W. DELLAPINA

I'm going to instruct him not to answer at least until we have a chance to discuss it because it's not clear to me it's something we will give voluntarily

Q. And you're going to follow your counsel's instruction not to answer that question, correct?

A. Yes, I will.

Q. And for the year 2003, can you tell me what your compensation was for that year including any bonus you received in connection with that year?

MR. WOLL: Same instruction.

Q. And I assume you are going to once again follow your counsel's instruction and not answer that question?

A. Yes, I'm going to.

Q. I think I have one more exhibit and one more question.

Actually, I forgot a question, so before I go to this exhibit I want to ask you a question.

How was your bonus compensation calculated in the years when

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575

JEFFREY W. DELLAPINA

you were working on the Enron prepay?

A. I don't know.

Q. You have no idea at all?

A. No. The bonus process is a, you know, it's a fairly subjective process as I understand. What goes into that clearly would be generally the performance of the group, a lot of other factors, nonfinancial factors as well. As far as I've been involved with the bonus process, in terms of what was decided for me, I was never privy to that information.

Q. Is one of the things that goes into the bonus process, that you understand goes into the process of determining your bonus the expected return that Chase either did receive or expects to receive on transactions like the prepay transactions that you worked on?

MR. WOLL: Object to the form of the question.

A. Sure, my impression is that the profitability of the prepay transactions would play a role in that. Which ones had

8/4/2004 8:05 PM

576

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Defendants.

\_\_\_\_\_  
**ORDER GRANTING LEAD PLAINTIFF'S MOTION TO ENFORCE  
DEPOSITION PROTOCOL ORDER AND TO COMPEL  
JP MORGAN CHASE TO PROVIDE DISCOVERY**

Having reviewed Lead Plaintiff's Motion to Enforce Deposition Protocol Order and to Compel J.P. Morgan Chase to Provide Discovery, and pursuant to and consistent with the Federal Rules of Civil Procedure and the Deposition Protocol Order dated March 11, 2004, the Court hereby orders that during depositions in this matter counsel shall not instruct witnesses to refrain from answering questions except on the ground of privilege, and cautions all parties that it will not tolerate violations of this Order or the Deposition Protocol Order. J.P. Morgan Chase will make Jeffrey Dellapina available for deposition for thirty minutes of further questioning concerning compensation, at a date chosen by plaintiffs.

IT IS SO ORDERED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
THE HONORABLE MELINDA HARMON  
UNITED STATES DISTRICT JUDGE

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